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IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 10-0142

KATHY HEFFERNAN, ROBIN CAREY,
DAVID HARMON, and NORTH DUNCAN DRIVE
NEIGHBORHOOD ASSOCIATION, INC.,

Plaintiffs, Petitioners, and Appellees,

-v-

MISSOULA CITY COUNCIL, CITY OF MISSOULA,
and JOHN ENGEN, Mayor,

Defendants, Respondents, and Appellants,

-v-

MUTH-HILLBERRY, L.L.C., Intervener-Defendant and Appellant.

AMICUS CURIAE BRIEF
MONTANA ASSOCIATION OF REALTORS, INC., a Montana corporation

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STATEMENT OF THE ISSUE

I. Whether the district court erred by granting Appellees' motion for summary judgment on grounds that the City of Missoula's zoning and land use decision failed to "substantially comply" with the Rattlesnake Valley Growth Policy and Montana zoning statutes.

STATEMENT OF THE CASE

The Montana Association of Realtors, Inc. ("MAR"), re-alleges and re-affirms the Statement of the Case contained in the Appellant Brief of Muth-Hillberry, L.L.C., and hereby incorporates said Statement herein by reference. The MAR takes no position on the procedural background of the case now before the Court.

STATEMENT OF THE FACTS

The MAR re-alleges and re-affirms the Statement of the Facts contained in the Appellant Brief of Muth-Hillberry, L.L.C., and hereby incorporates said Statement herein by reference. The MAR adopts said facts for the sole and limited purpose of addressing the pertinent legal issues in the case now before the Court.

STANDARD OF REVIEW

The MAR re-alleges and re-affirms the Standard of Review contained in the Appellant Brief of Muth-Hillberry, L.L.C., and hereby incorporates said Standard herein by reference. The MAR adopts said standard for the sole and limited purpose of addressing the pertinent legal issues in the case now before the Court.

SUMMARY OF THE ARGUMENT

The district court erred by granting Appellees' motion for summary judgment on grounds that the City's zoning and land use decisions failed to "substantially comply" with the Rattlesnake Plan and Montana zoning statutes. The district court exceeded its appellate function and improperly used the growth policy statute [MCA § 76-1-605] as a regulatory document to set aside the City's land use decision.

The "substantial compliance" standard did not survive the 2003 Amendment to MCA § 76-1-605 and, thus, the district court's Opinion and Order granting Appellees' motion for summary judgment and denying Appellants' cross motions for summary judgment should be reversed.

ARGUMENT

I. The district court erred by granting Appellees' motion for summary judgment on grounds that the City of Missoula's zoning and land use decision failed to "substantially comply" with the Rattlesnake Valley Growth Policy and Montana zoning statutes.

The district court erred by granting Appellees' motion for summary judgment on grounds that the City's zoning and land use decision failed to "substantially comply" with the Rattlesnake Valley Growth Policy and Montana zoning statutes. In doing so, the district court completely eviscerated any degree of deference afforded local governments under Montana law in making land use decisions. The district court exceeded its appellate function and improperly used

the growth policy statute [MCA § 76-1-605] as a regulatory document to set aside the City's land use decision.

For reasons more particularly set forth herein below, the district court's Opinion and Order granting Appellees' motion for summary judgment and denying Appellants' cross motions for summary judgment should be reversed.

A. The district court exceeded its appellate function and incorrectly applied the "limited scope" standard of review.

The district court exceeded its appellate function and incorrectly applied the applicable "limited scope" standard of review in granting Appellee's motion for summary judgment and setting aside the City's decision. MCA § 76-3-625(2) provides in pertinent part:

> "A party identified in subsection (3) who is aggrieved by a decision of the governing body to approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision or a final subdivision plat may, within 30 days from the date of the written decision, appeal to the district court in the county in which the property involved is located ..."

This Court in North Fork Preservation Ass'n v. Dept. of State Lands, 238 Mont. 451, 778 P.2d 862 (1989), set forth in detail the standard of review to be applied by district courts in reviewing decisions of administrative agencies in the legislative branch of government. While the standard of review we have adopted utilizes three terms, it breaks down into two basic parts. North Fork, 238 Mont. at 459, 778 P.2d at 867.

First, the district court must decide whether the agency action could be held unlawful due to its failure to exercise discretion conferred by the law or its having exceeded its powers under applicable statutes and regulations. North Fork, 238 Mont. at 459-60, 778 P.2d at 867-68. Second, the district court must decide whether the agency action could be held arbitrary or capricious. North Fork, 238 Mont. at 459, 778 P.2d at 867.

In making the factual inquiry concerning whether an agency decision was "arbitrary or capricious", the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." North Fork, 238 Mont. at 465, 778 P.2d at 871, quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). This inquiry must "be searching and careful," but "the ultimate standard of review is a *narrow one*." Id. (emphasis added).

In recognizing the limited scope of [district court] review in administrative cases, the North Fork Court went on to state that "[w]e cannot substitute our judgment for that of the [legislative agency] by determining whether its decision was 'correct'." North Fork, 238 Mont. at 465, 778 P.2d at 871, citing Thornton v. Comm'r of the Dep't of Labor and Indus., 190 Mont. 442, 621 P.2d 1062 (1981), et al.

Instead, we must examine the [legislative agency's] decision to see whether it is "so at odds with [the information presented] that it could be characterized as arbitrary or the product of caprice." North Fork, 238 Mont. at 465, 778 P.2d at 871, see also Madison River R.V. Ltd. v. Town of Ennis, 298 Mont. 91, 994 P.2d 1098 (2000), and Kiely Construction, L.L.C. v. City of Red Lodge, 312 Mont. 52, 57 P.3d 836 (2002) (both cases adopting the North Fork "limited scope" standard of review).

Here, Appellees persuaded the district court to exceed its "limited scope" of review and assume the role of the governing body. In challenging the City's decision approving the preliminary plat of the Sonata Park Subdivision, Appellees and the district court blatantly ignored substantial and voluminous evidence in the record supporting the decision and selectively focused on the City's alleged failure to substantiate its findings and otherwise comply with the Rattlesnake Plan and Montana zoning statutes. (Op. and Order, 2/24/10, at 9:5-23).

For example, the Executive Summary ("Staff Report"), while noting that the rezoning request failed to substantially comply with the Growth Policy regarding residential density, indicates that "the proposed zoning complies with some basic goals and objectives" of the Rattlesnake Plan. (Brief, 10/3/08, at p. 9, Tab 6 pp. 1274-1280). To that end, Appellees' misguided argument that failure to satisfy one singular goal or objective of the Rattlesnake Plan warrants a set aside of the

City's decision should have failed in the district court, but did not. The district court's ruling contradicts the inherent degree of deference afforded local governments under Montana law in making land use decisions.

In assuming the role of the governing body, the district court failed to consider that the City properly balanced all relevant objectives and goals of the Rattlesnake Plan and Montana zoning statutes in rendering its land use decision. The City's decision was not unlawful nor was it "arbitrary or capricious". The district court clearly exceeded the bounds of its "limited scope" appellate review and improperly substituted its judgment for that of the City in searching for "correctness".

Thus, the district court's Opinion and Order granting Appellees' motion for summary judgment and denying Appellants' cross motions for summary judgment should be reversed.

B. A governing body's land use decision need not "substantially comply" with an adopted growth policy.

A governing body's land use decision need not "substantially comply" with an adopted growth policy. The "substantial compliance" rule promulgated in Little v. Board of County Comm'rs, 193 Mont. 334, 631 P.2d 1282 (1981), and relied upon by the district court in setting aside the City's decision, was abrogated by the Montana Legislature's 2003 Amendment to MCA § 76-1-605 and subsequent case law.

The history of the growth policy statute [MCA § 76-1-605] is discussed by era in turn as follows.

i. Pre-2003 Growth Policy: "Substantial Compliance" Rule

On July 21, 1981, this Court decided Little which first recognized that the "vital role given the planning boards" under Montana law "cannot be undercut by giving the governing body the freedom to ignore the product of these boards the master plan." Little, 193 Mont. at 353, 631 P.2d at 1293. Thus, this Court addressed the level of adherence to the master plan by which the governing body was bound when zoning. Id.

In Little, the Flathead County Commissioners appealed to this Court from a Flathead District Court order enjoining them from proceeding further with their resolution of intent to zone the Cameron Tract (a 59-acre tract) for commercial use so that a shopping center could be built on the land. Little, 193 Mont. at 336, 631 P.2d at 1284. The developers, defendants by intervention, appealed from the part of the order preventing the City of Kalispell from issuing building permits to allow construction on the tract. Id. Plaintiffs were landowners adjacent to the tract who opposed plans to construct the shopping center. Id.

In granting the adjacent landowners injunctive relief, the district court ruled that the county commissioners violated the law in several ways. Id. Most notably, the district court ruled that the comprehensive plan (the master plan) must be

followed, and that commercial use of the Cameron Tract could be effectuated only by amending the master plan with the approval of both the City of Kalispell and Flathead County. Little, 193 Mont. at 337, 631 P.2d at 1284.

On appeal, the County argued, *inter alia*, that the district court erred in ruling that the County should have followed the comprehensive plan (master plan). Id. The County failed to contend what status, if any, the plan should have other than arguing that the plan was merely a guide in zoning decisions. Id.

Accordingly, this Court framed the critical issue as "how closely the [comprehensive] plan must be followed [by the governing body] when creating zoning districts and promulgating zoning regulations." Little, 193 Mont. at 348, 631 P.2d at 1290. The County, relying on statutes defining the role of planning boards before and after adoption of the plan, argued that the plan was advisory only and that the governing body had authority to zone and allocate to the plan whatever weight it wanted. Little, 193 Mont. at 349, 631 P.2d at 1290-91.

Alternatively, the City and adjacent landowners argued that although the plan need not be religiously followed in every detail, substantial compliance was required. Little, 193 Mont. at 349, 631 P.2d at 1291. In other words, they argued that to zone the Cameron Tract for commercial use would first require an amendment to the plan [which was] approved by the governing bodies of the City and County. Id.

In analyzing the issue, this Court cited MCA § 76-1-605 which, at the time of its decision in 1981, provided as follows:

> "After adoption of the master plan, the city council, the board of county commissioners, or other governing body within the territorial jurisdiction of the board shall be guided by and give consideration to the general policy and pattern of development set out in the master plan in the ... (4) adoption of zoning ordinances or resolutions."

Little, 193 Mont. at 349-50, 631 P.2d at 1291.

This Court interpreted the foregoing statute, in conjunction with the then-effective zoning statutes, to unequivocally instruct governing bodies that once a master plan is adopted, it must be used for guidance in zoning. Little, 193 Mont. at 350, 631 P.2d at 1291. Although this Court recognized that requiring strict compliance with the plan would create an unworkable standard, it also noted that requiring no compliance at all would defeat the whole idea of planning. Little, 193 Mont. at 353, 631 P.2d at 1293.

The Court ultimately adopted a "flexible" substantial compliance standard designed not to require constant change to the plan, yet sufficiently definite so that those charged with adherence could recognize an acceptable and unacceptable deviation therefrom. Id. In sum, Little stands for the proposition that, prior to the Montana Legislature's 2003 Amendment to MCA § 76-1-605, a governmental unit, when zoning, needed to substantially adhere to the master plan.

See also Bridger Canyon Property Owners' Ass'n, Inc. v. Planning and Zoning Comm'sn, 270 Mont. 160, 890 P.2d 1268 (1995) (adopting Little "substantial compliance" rule), and North 93 Neighbors, Inc. v. Board of County Comm'rs, 332 Mont. 327, 137 P.3d 557 (2006) (adopting Little "substantial compliance" rule and ignoring the 2003 Amendment to MCA § 76-1-605).

Here, the district court relied solely upon Little and North 93 in applying the "substantial compliance" rule and granting Appellees' motion for summary judgment. The district courted erred in its ruling and selectively ignored the 2003 Amendment to MCA § 76-1-605 and this Court's subsequent decision in Citizen Advocates for a Livable Missoula, Inc. v. City Council, 331 Mont. 269, 130 P.3d 1259 (2006), which abrogated the "substantial compliance" rule *in toto* and significantly reduced the level of adherence to the master plan by which a governing body is bound in making a land use decision.

ii. 2003 Amendment: "Substantial Compliance" Abrogated

In response to ongoing confusion concerning the growth policy statute [MCA § 76-1-605] and its associated authority over governing bodies in land use decisions, Senator Dan McGee of Laurel, Montana sponsored SB 326 in the Montana Legislature in 2003. On February 11, 2003, in his opening statement before the Senate Committee on Local Government, Senator McGee described SB 326 as follows:

> "[T]his [is] a revision to the growth policy act...It ha[s] become apparent there were issues that needed to be addressed in regard to the current status of the growth policy act...This bill [is] to clarify that growth policy was not required, it was not regulatory, it does not require a vote of the people, and that growth policy can be the same document as an existing master plan or similar planning document...[U]nder the terms of this bill any local government with a duly adopted planning document is free to amend it's zoning and subdivision regulations."
>
> Minutes, Senator McGee, 02/11/03, at pp. 3-4 (Appendix, Exhibit "A").

The introduction of SB 326 elicited overwhelming support from numerous individuals and organizations including, but not limited to, the MAR, the Billings/Yellowstone Planning Department, Plum Creek Timber, Stillwater County, the City Kalispell, and the Montana Association of Counties. Jerry Sorensen testified on behalf of Plum Creek Timber in support of the bill as follows:

> "...[The growth policy] should be a *guide* to what your community would do in the future, in terms of where growth should go, where water and sewer should go, [and] where recreation facilities should be ..." (emphasis added).
>
> Minutes, Jerry Sorensen, 02/11/03, at pp. 4-5. (Appendix, Exhibit "A", Exhibit "B").

The proponents of SB 326 repeatedly and unequivocally stated that the bill was "particularly important" in clarifying that "[growth policies] were not regulatory documents." Minutes, Peggy Trenk for the MAR, 02/11/08, at p. 6 (Appendix, Exhibit "C"). The bill was designed to provide "added flexibility to

local governments" in making land use decisions. Minutes, Byron Roberts for the Montana Building Industry Association, 02/11/08, at p. 6 (Appendix, Exhibit "C").

Moreover, SB 326 gave planning boards and governing bodies "full discretion to address the context [of a growth policy] in a manner the[y] deem appropriate to their jurisdiction." Minutes, Senator McGee, 02/11/03, at p. 7 (Appendix, Exhibit "D"). In other words, "one of the major considerations of [the] bill was to address the issue of local control." Minutes, Senator McGee, 02/11/03, at p. 8. (Appendix, Exhibit "E"). "...[W]hen it comes to planning the more local control over the process the better." Id. "This bill puts the control back where it belongs, with the direct representatives of the people, the local government." Id.

A final, yet equally important, objective of SB 326 was to address growing concern that local governments were falling victim to drones of lawsuits and costly litigation because the pre-2003 growth policy statute [MCA § 76-1-605] was considered binding, regulatory, and required "substantial compliance". Minutes, Forrest Sanderson for Flathead County, 2/11/03, at p. 4 (Appendix, Exhibit "A"). To this end, Mr. Sanderson stated:

> "[I] contacted the Senator [McGee] to bring the bill. [I have] lawsuits stacked up on changing subdivision regulations...This [bill] only affects new zoning...Flathead County full[y] support[s] the bill ...It [is] important to remember that planning [is] locally driven...I hope [we will] not tie [our] hands with legislative action."
>
> Id.

Russ Crowder for the City of Kalispell echoed this sentiment and testified in support of SB 326:

> "...[T]he governments closest to the people [are the best]...[The pre-2003] growth policy [statute is] very complex and allows out of state organizations to bring lawsuits to stop projects."
>
> Minutes, Russ Crowder for the City of Kalispell, 2/11/03, at p. 5 (Appendix, Exhibit "B".

Each of the foregoing concerns and objectives were addressed by Senator Mike Wheat during discussion before the Senate Committee on Local Government on February 19, 2003. Senator Wheat explained:

> "...[T]he amendment ...addresses Senator McGee's worries that local governments are being sued because growth policies are considered regulatory. [I want] to make sure to keep language that said growth policies could not be used a[s] regulatory documents. [T]he amendment [is] designed to make that clear...[I am] trying to preserve the integrity of the growth policy statutes and still address the concerns of the various people..."
>
> Minutes, Senator Wheat, 02/19/03, at p. 4 (Appendix, Exhibit "F").

When asked by Senator McGee whether "the amendment still required a growth policy to be regulatory", Senator Wheat responded, "No. [The amendment] made it not regulatory. [I also] made the list of requirements discretionary." Minutes, Senators McGee and Wheat, 2/19/03, at p. 4 (Appendix, Exhibit "F"). Simply put, "[The growth policy is] not a regulatory document, it

[is] for setting parameters for local governments to have discretion on how their community should exist." Minutes, Senator Laible, 4/15/03, at p. 3 (Appendix, Exhibit "G"). SB 326 was designed to "accomplish maximum flexibility for the local governments." Minutes, Michael Kakuk, Esq., attorney representing the MAR, 04/15/03, at p. 4 (Appendix, Exhibit "H").

SB 326 was signed by the Governor on May 9, 2003. The text of MCA § 76-1-605 has remained unchanged since 2003 and provides as follows:

> **Use of adopted growth policy**. (1) Subject to subsection (2), after adoption of a growth policy, the governing body within the area covered by the growth policy pursuant to 76-1-601 must be guided by and give consideration to the general policy and pattern of development set out in the growth policy in the :
>
> (a) authorization, construction, alteration, or abandonment of public ways, public places, public structures, or public utilities;
>
> (b) authorization, acceptance, or construction of water mains, sewers, connections, facilities, or utilities; and
>
> (c) adoption of zoning ordinances or resolutions.
>
> (2) (a) A growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to the law.
>
> (b) A governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter.

(Appendix, Exhibit "I").

This statute renders an adopted growth policy, such as the Rattlesnake Plan at issue in the instant case, merely advisory and does not require the governing

body to "substantially comply" with its content. Pursuant to the 2003 Amendment, local governments have full discretion to address the context of a growth policy in a manner they deem appropriate to their jurisdiction on a case-by-case basis.

Accordingly, the district court erred by granting Appellees' motion for summary judgment on grounds that the City's decision failed to "substantially comply" with the Rattlesnake Valley Growth Policy and Montana zoning statutes. The "substantial compliance" rule was abrogated *in toto* by the 2003 Amendment and subsequent case law and is no longer good law in Montana.

iii. Citizen Advocates: Current Status Of The Growth Policy Statute

In Citizen Advocates, a group of Missoula citizens ("Citizens") initiated a district court action arguing that the City Council's approval of a revised zoning proposal violated the 2002 Missoula County Growth Policy and the 2000 Joint Northside/Westside Neighborhood Plan. Citizen Advocates, 331 Mont. at ¶ 13, 130 P.3d at ¶ 13. The district court ultimately granted summary judgment to the City Council on grounds that it did not abuse its discretion when it adopted the zoning proposal. Citizen Advocates, 331 Mont. at ¶ 14, 130 P.3d at ¶ 14. The Citizens timely appealed to this Court. Citizen Advocates, 331 Mont. at ¶ 15, 130 P.3d at ¶ 15.

On appeal, this Court analyzed whether the district court erred by granting summary judgment in favor of the City Council and, more specifically, again

posed the question of "how closely a growth policy and neighborhood plan must be followed by a city when it zones lands pursuant to the statutory scheme." Citizen Advocates, 331 Mont. at ¶¶ 18-22, 130 P.3d at ¶¶ 18-22. In answering this question, this Court pointed out a glaring contradiction between the then-effective zoning statute [MCA § 76-2-304 (2003)] and growth policy statute [MCA § 76-1-605 (2003)]. Citizen Advocates, 331 Mont. at ¶ 22, 130 P.3d at ¶ 22.

> MCA § 76-2-304 (2003) provides in pertinent part:
>
> "[z]oning regulations must be ...made *in accordance* with a growth policy..." (Emphasis in original).
>
> Alternatively, MCA § 76-1-605 (2003) provides in pertinent part:
>
> "the governing body within the area covered by the growth policy pursuant to 76-1-601 *must be guided by and give consideration* to the general policy and pattern of development set out in the growth policy in the: ...(c) adoption of zoning ordinances or resolutions." (Emphasis in original).
>
> Citizen Advocates, 331 Mont. at ¶ 22, 130 P.3d at ¶ 22.

In attempting to reconcile this statutory incongruence and eliminate confusion, this Court cited its prior decision in Little and again applied the "substantial compliance" rule. Citizen Advocates, 331 Mont. at ¶ 23, 130 P.3d at ¶ 23, citing Little, 193 Mont. at 353, 631 P.2d at 1293. However, this Court importantly also recognized the Legislature's 2003 Amendment to MCA § 76-1-605 and discussed its potential impact on the "substantial compliance" rule. Citizen Advocates, 331 Mont. at ¶ 24, 130 P.3d at ¶ 24.

To that end, this Court stated, "From its plain meaning, it may be assumed that the 2003 legislation was intended to reduce in some fashion the reliance which local governing bodies are required to place upon growth policies when making land use decisions." Citizen Advocates, 331 Mont. at ¶ 25, 130 P.3d at ¶ 25. However, because the litigants in the case framed their arguments regarding the validity of the ordinance at issue under the Little "substantial compliance" standard, this Court remained "mindful" of the statutory changes, but left "for another day the question of what effect the 2003 legislation has had on the 'substantial compliance' standard." Id.

Here, Muth-Hillberry, L.L.C. preserved argument in the district court that the 2003 Amendment abrogated the "substantial compliance" standard *in toto* and vested the City with broad discretion to address the context of the Rattlesnake Plan and Montana zoning statutes in a manner it deemed appropriate to its jurisdiction. Any cognizable review of the legislative history behind SB 326 and the current text of MCA § 76-1-605 indicates that the district court improperly used the statute as a regulatory document to exceed its appellate function and second guess the "correctness" of the City's decision.

The MAR and the Appellants now strongly urge this Honorable Court, under its holding in Citizen Advocates, to issue an opinion unequivocally overruling the "substantial compliance" standard in light of the 2003 Amendment

to MCA § 76-1-605. Permitting district courts to continue applying the "substantial compliance" standard will leave open the floodgates for litigation and deprive governing bodies of precisely the discretion SB 326 was intended to vest them with. Allowing district courts to escape the bounds of their appellate function under MCA § 76-3-625(2), improperly deprives local governments of the deference and discretion afforded to them under Montana law in making land use decisions.

Clearly, under the plain language of MCA § 76-1-605, adopted growth policies such as the Rattlesnake Plan are to serve merely as advisory guides to be given consideration by governing bodies in making land use decisions. Adopted growth policies are not binding or regulatory documents. In the instant case, the City was not required to substantially adhere to the density recommendations of the Rattlesnake Plan and permit only 7-8 homes on the 34.08 acres on which the Sonata Park Subdivision is situated because the "substantial compliance" rule failed to survive the 2003 Amendment and subsequent case law.

The MAR and the Appellants do not contend that local governments are free to completely ignore adopted growth policies thereby defeating the whole idea of planning. Rather, they urge this Court to overrule the "substantial compliance" standard which has repeatedly proved itself unworkable and led to widespread litigation across Montana. Going forward, the general policy and pattern of

development set out in adopted growth policies need to be given due consideration and viewed holistically in the context of the entire plan. Local governments are adequately equipped to exercise discretion in making land use decisions based upon informed and intelligent considerations.

Growth policies are inherently designed to provide for flexibility in application thereby allowing local governments to meet some goals and objectives deemed more important and not meet others. The essence of the subdivision review process vests local governments with broad discretion to "balance" various goals and objectives on a case-by-case basis and arrive at plans which work best in a given jurisdiction. In most cases, local governments exercise this discretion admirably, but sometimes their decisions may still leave one or both parties unhappy.

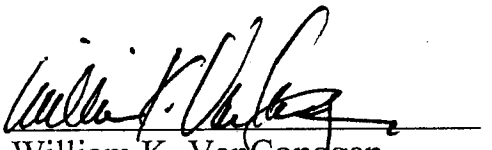
In sum, local governments are capable of exercising discretion in making land use decisions without simultaneously defeating the fundamental purpose of planning. Local governments need not "substantially comply" with adopted growth policies in order to carry out objectives of MCA § 76-1-605. The proper interpretation of that statue warrants an overruling of the Little "substantial compliance" standard incorrectly relied upon by the district court in granting Appellees' motion for summary judgment in the instant case.

CONCLUSION

The district court erred by granting Appellees' motion for summary judgment on grounds that the City's zoning and land use decisions failed to "substantially comply" with the Rattlesnake Plan and Montana zoning statutes. The district court exceeded its appellate function and improperly used the growth policy statute [MCA § 76-1-605] as a regulatory document to set aside the City's land use decision.

The "substantial compliance" standard did not survive the 2003 Amendment to MCA § 76-1-605 and, thus, the district court's Opinion and Order granting Appellees' motion for summary judgment and denying Appellants' cross motions for summary judgment should be reversed.

DATED this 13th day of July, 2010



William K. VanCanagan
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Amicus Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WORD for Windows, is not more than 5,000 words excluding certificate of service, certificate of compliance, table of contents and table of authorities.

Dated this 13th day of July, 2010.

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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Datsopoulos, MacDonald & Lind, P.C., hereby certify that a true and correct copy of the foregoing was mailed or faxed, postage prepaid, this 13th day of July, 2010, to the following:

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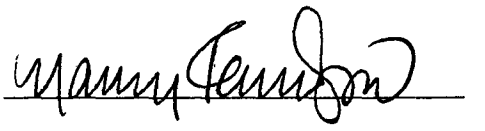
By: 

APPENDIX

A. Senate Committee on Local Government, February 11, 2003 Hearing on SB 326, Minutes, p. 3.

B. Senate Committee on Local Government, February 11, 2003 Hearing on SB 326, Minutes, p. 5.

C. Senate Committee on Local Government, February 11, 2003 Hearing on SB 326, Minutes, p. 6.

D. Senate Committee on Local Government, February 11, 2003 Hearing on SB 326, Minutes, p. 7.

E. Senate Committee on Local Government, February 11, 2003 Hearing on SB 326, Minutes, p. 8.

F. Senate Committee on Local Government, February 19, 2003 Hearing on SB 326, Minutes, p. 4

G. Conference Committee on House Amendments to Senate Bill 326, April 15, 2003, Minutes, p. 3.

H. Conference Committee on House Amendments to Senate Bill 326, April 15, 2003, Minutes, p. 4.

I. Senate Bill No. 326